Supreme Court, U.S.
FILED
FEB 18 1997
CLERK

No 96-1229

In The

Supreme Court of the United States

October Term, 1996

DARYL GATES, TOM BRADLEY, HERBERT BOECKMANN, JERRY BROOKS, JOSEPH CALLIAN, MICHAEL SIRK, RICHARD SPELMAN, GARY STRICKLAND, JAMES TIPPINGS, RICHARD ZIERENBERG, MANUEL AVILA, CHARLES BENNETT, BRIAN DAVIS, JOHN FRUGE, JOSEPH FREIA, EDWARD GUIZA, PETER SANCHEZ, REGINALD WEAVER, JAMES TOMA, C.S. WINSTON, PHILIP WIXON, GARY ZERBEY, JOEL WACHS, JOY PICUS, JOHN FERRARO, ZEV YAROSLAVKSY, RUTH GALANTER, ERNANI BERNARDI, NATE HOLDEN, MARVIN BRAUDE, HAL BERNSON, MICHAEL WOO, JOAN FLORES, CITY OF LOS ANGELES, all in both their individual and official capacities; and CITY OF LOS ANGELES,

Cross-Petitioners,

v.

JOHANNA TREVINO, a minor,

Cross-Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

GEORGE C. PRATT
PARNON & PRATT
10 Rockefeller Plaza
New York, New York 10020
(212) 698-7980

RAMSEY CLARK
LAWRENCE W. SCHILLING
36 East 12th Street
New York, New York 10003
(212) 475-3232

Of Counsel

STEPHEN YAGMAN
Counsel of Record
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291-3270
(310) 452-3200

Attorneys for Cross-Respondent, Johanna Trevino

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

JURISDICTION

Cross-respondent disagrees with cross-petitioners' jurisdictional statement, in which cross-petitioners contend that their cross-petition timely is made.

It appears that the cross-petition properly should be denominated as a *conditional* cross-petition because the judgment of the court of appeals having been entered on November 1, 1996, and the cross-petition having been docketed on February 3, 1997, more than 90 days elapsed between the two dates, and therefore, a straight cross-petition would be out of time, and, pursuant to Supreme Court Rules 13.1 and 12.5, the present cross-petition properly is a *conditional* cross-petition, and its cover should indicate that fact. Rule 12.5.

REASONS FOR DENYING THE CROSS-PETITION

The cross-petition should be denied for these reasons:

1. Cross-petitioners could have, but failed to cite to the court below the case on which they rely for their contention that there is a conflict among the circuit courts of appeals on the issue on which they seek certiorari.

2. There is no conflict among the circuits on the issue of which review is sought.

3. The point of law in the case which cross-petitioners claim creates a conflict among the circuits is dictum.

1. CROSS-PETITIONERS' LACK OF DILIGENCE SHOULD PRECLUDE GRANTING CERTIORARI.

Cross-petitioners rely on *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179, 1189-90 (1st Cir. 1996), as the basis for their contention that a conflict among the circuit

courts of appeals exists, and that on this ground certiorari should be granted.

Andrade was decided by the First Circuit on May 1, 1996, and oral argument in this case in the court below was held on August 6, 1996, three months after the *Andrade* disposition was rendered. The court below did not render its disposition in this action until three months after oral argument, and rendered its disposition on November 1, 1996. As cross-petitioners concede, they neither cited *Andrade* to the court below nor petitioned the court below either for rehearing or rehearing *en banc*.

Cross-petitioners were not diligent in their research and made no attempt to address the alleged conflict among the circuit courts of appeals on the issue of which review is sought, and their lack of diligence should weigh against granting certiorari.

Further, should this Court find there to be a true conflict among the circuits, the appropriate action to take would be to remand the matter to the court below to provide it with an opportunity to address such conflict, as it should have had such an opportunity but for the manner in which cross-petitioners proceeded.

For this reason, certiorari should be denied, or a remand should be granted to permit the court below to address an issue that could have been put before it, but which was not put before it.

2. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHICH REVIEW IS SOUGHT.

There is no compelling reason to grant certiorari because there is no real conflict among the circuit courts of appeals on the issue of which review is sought.

Though cross-petitioners do not appear to quote from the opinion below on the relevant point, what the court below said clearly does not provide any basis for the claim that there is a conflict among the circuit courts of appeals. All the court below said was this: "the district court should not have relied on the rates paid by the City to private attorneys for defending excessive force cases *as a starting point* for the reasonable hourly rate." *Trevino v. Gates*, 99 F.3d 911, 925 (9th Cir. 1996) (emphasis added).

The court below did *not* preclude use of the rates paid by a government entity to outside counsel in the mix of determining a reasonable hourly rate for plaintiffs' civil rights counsel. Rather, it held that that rate could not be used "as the starting point for [determining] the reasonable hourly rate." There is nothing exceptional at all about this statement, and it does not serve as a basis for contending there is a conflict among the circuit courts of appeals on the hourly rate issue. Furthermore, the holding of the court below is fully consistent with every prior precedent of this court on the fixing of hourly rates under 42 U.S.C. 1988(b), and is not inconsistent with the letter or the spirit of any prior precedent of this court on this issue.

There is no conflict between the Eleventh Circuit's holding in *Brooks v. Georgia State Board of Elections*, 997 F.2d 857, 870 (11th Cir. 1993), and *Andrade*. What *Brooks* held was not that government outside counsel rates could not be used, but that "it was clear error for the district court panel to rely so heavily on the rate paid to opposing counsel." There is nothing exceptional about this holding, and it, too, is fully consistent with the precedents of this Court, it is not inconsistent with the letter or spirit of any prior precedent of this Court, and both the holdings in *Trevino* and *Brooks* fall well within the broad discretion

this Court has accorded to lower courts in fixing Section 1988 hourly rates.

Finally, having told the district court to "reanaly[ze the hourly rate selected in this case] in light of our adoption of *Brooks*," 99 F.3d at 925, the court below also told the district court that it "do[es] not necessarily disagree with the final result reached by the district court and this decision does not preclude the district court from reaching the same decision after consideration of different hourly rates." *Ibid.* Hardly is this the stuff on which certiorari is granted.

3. THE HOLDING RELIED ON IN *ANDRADE* IS OBITER DICTUM, WHICH DOES SERVE AS A BASIS FOR THE CONTENTION THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

In *Andrade*, the court held that

> The magistrate set the rate for Andrade's attorney at $125/hr., reasoning that $200/hr. is not a reasonable rate for civil rights litigation in the Providence, Rhode Island, area, Andrade had not provided adequate support for the higher rate, and *no reason presented itself why Andrade's attorney's rate should be more than the defense attorneys' rates.*

82 F.3d at 1190 (emphasis added).

Clearly, the rate was set as it was because of lack of adequate support for a higher rate, which is a complete-in-itself basis for the decision reached, and no reason was presented why the plaintiff's counsel's rate should be higher than the defense rate.

On this record, because even if the holding in *Andrade* were as cross-petitioners contend it is, which it is not, since use of defense counsel rates was not necessary for the court to reach its decision, the supposed holding

is *obiter dictum*, which is not a proper predicate on which to base the claim that there is a conflict among the circuit courts of appeals. There was no adequate support for the higher rate claimed, and there was no reason not to use the defense rate. Thus, there was no *legal* issue in contention on this point.

This holding is an unexceptional, fact-bound ruling, and is not at odds with the holdings in the Ninth Circuit and the Eleventh Circuit. All three holdings in *Brooks*, *Trevino*, and *Andrade* are both correct and in full accord with all precedent from this Court on the point in issue.

CONCLUSION

For the reasons set forth, the cross-petition should be deemed to be a *conditional* cross-petition, and it should be denied because there is no conflict among the circuit courts of appeals on the issue presented, and because the disposition below, on the point raised, is fully consistent with all precedent from this Court on the issue raised.

Dated: February 17, 1997.

Respectfully submitted,

GEORGE C. PRATT
PARNON & PRATT
10 Rockefeller Plaza
New York, New York
10020
(212) 698-7980

RAMSEY CLARK
LAWRENCE W. SCHILLING
36 East 12th Street
New York, New York
10003
(212) 475-3232

Of Counsel

STEPHEN YAGMAN
Counsel of Record
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California
90291-3270
(310) 452-3200

Attorneys for
Cross-Respondent,
Johanna Trevino